

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BOARD OF TRUSTEES OF THE LABORERS  
HEALTH AND WELFARE TRUST FUND FOR  
NORTHERN CALIFORNIA; BOARD OF  
TRUSTEES OF THE LABORERS  
VACATION-HOLIDAY TRUST FUND FOR  
NORTHERN CALIFORNIA; BOARD OF  
TRUSTEES OF THE LABORERS PENSION  
TRUST FUND FOR NORTHERN  
CALIFORNIA; and BOARD OF TRUSTEES  
OF THE LABORERS TRAINING AND  
RETRAINING TRUST FUND FOR  
NORTHERN CALIFORNIA,

Plaintiffs,

v.

KUDSK CONSTRUCTION, INC.; and  
LARRY JAMES KUDSK,

Defendants.

No. C 12-165 CW

ORDER GRANTING  
PLAINTIFFS' MOTION  
TO STRIKE ANSWER  
(Docket No. 18)

\_\_\_\_\_  
Plaintiffs Board of Trustees of the Laborers Health and  
Welfare Trust Fund for Northern California, Board of Trustees of  
the Laborers Vacation-Holiday Trust Fund for Northern California,  
Board of Trustees of the Laborers Pension Trust Fund for Northern  
California, and Board of Trustees of the Laborers Training and  
Retraining Trust Fund for Northern California move to strike the  
answers to Plaintiffs' complaint filed by Defendants Kudsk  
Construction, Inc. and Larry James Kudsk. Defendants have not  
filed a response to Plaintiffs' motion. The Court takes  
Plaintiffs' motion under submission on the papers. Having  
considered the papers filed by Plaintiffs, the Court GRANTS the  
motion and STRIKES Defendants' answers.

## BACKGROUND

On January 10, 2012, Plaintiffs filed their complaint seeking to recover employee fringe benefit contributions owed by Defendants. Docket No. 1.

On February 15, 2012, Defendants, through shared counsel, filed answers to Plaintiffs' complaint. Docket Nos. 6 and 7.

On February 29, 2012, at the request of Defendants, the parties agreed to and filed a joint stipulation to stay the case for ninety days to allow the parties attempt to resolve the dispute informally. Docket No. 14; Richman Decl. ¶ 3.

On March 2, 2012, the Court granted the parties' stipulation and ordered the parties to appear at a case management conference on June 6, 2012 at 2:00 p.m. Docket No. 15. The Court directed the parties to submit a joint case management statement seven days prior to the case management conference advising the Court as to the status of the parties' informal attempts to resolve the case.

Id.

Once the stay was issued, Defendants refused to respond to Plaintiffs' attempts to discuss the case. Richman Decl. ¶ 3. Prior to the case management conference, Plaintiffs drafted a joint case management statement and sent it to Defendants for their input. Id. at ¶ 4. Defendants did not respond. Id.

Defendants failed to appear at the June 6, 2012 case management conference. Docket No. 17. At that time, the Court directed Plaintiffs to file a motion for default judgment.

On July 6, 2012, Plaintiffs filed the instant motion to strike Defendants' answers. Docket No. 18. Pursuant to Civil Local Rule 7-3(a), Defendants were required to file their response

1 to the motion to strike by July 20, 2012. Defendants have not  
2 filed a response.

3 LEGAL STANDARD

4 "District courts have inherent power to control their  
5 dockets. In the exercise of that power they may impose sanctions  
6 including, where appropriate, default or dismissal." Thompson v.  
7 Housing Authority of Los Angeles, 782 F.2d 829, 831 (9th Cir.  
8 1986). Federal Rule of Civil Procedure 16(f) provides, among  
9 other things, that, if a party or its attorneys "fails to appear  
10 at a scheduling or other pretrial conference" or "fails to obey a  
11 scheduling or other pretrial order," the court "may issue any just  
12 orders, including those authorized by Rule 37(b)(2)(A)(ii)-(vii).  
13 See Federal Rule of Civil Procedure 16(f)(1)(A)-(C). Rule  
14 37(b)(2)(A)(iii), in turn, authorizes the court to strike  
15 pleadings in whole or in part. "Where the sanction results in  
16 default, the sanctioned party's violations must be due to the  
17 willfulness, bad faith, or fault of the party." Hester v. Vision  
18 Airlines, Inc., 2012 U.S. App. LEXIS 14683, at \*13 (9th Cir.)  
19 (internal quotations omitted). "Disobedient conduct not shown to  
20 be outside the control of the litigant is sufficient to  
21 demonstrate willfulness, bad faith, or fault." Jorgenson v.  
22 Cassiday, 320 F.3d 906, 912 (9th Cir. 2003).

23 "A court must consider the following five factors before  
24 striking a pleading or declaring default: (1) the public's  
25 interest in expeditious resolution of litigation; (2) the court's  
26 need to manage its docket; (3) the risk of prejudice to the other  
27 party; (4) the public policy favoring the disposition of cases on  
28 their merits; and (5) the availability of less drastic sanctions."

1 Hester, 2012 U.S. App. LEXIS 14683, at \*14 (internal quotations  
2 omitted). Three subfactors that assist in evaluating the fifth  
3 factor include (1) the availability of lesser sanctions; (2) the  
4 use of lesser sanctions before termination; and (3) the adequate  
5 warning of the possibility of termination. Id. at \*16. "The fact  
6 that a court does not implement a lesser sanction before striking  
7 an answer is not dispositive." Id. at \*17. Further, while a  
8 court may be required to provide warning when a court sua sponte  
9 dismisses a case, an express warning of the possibility of  
10 termination is not required in the context of a noticed motion.  
11 See In re Phenylpropanolamine (PPA) Prods. Liab. Litig., 460 F.3d  
12 1217, 1229 (9th Cir. 2006).

#### 13 DISCUSSION

14 Defendants here have failed to comply with the Court's  
15 scheduling order by refusing to participate in the preparation of  
16 a joint case management statement and failing to appear at the  
17 case management conference. Defendants also failed to engage in  
18 informal settlement discussions after requesting that Plaintiffs  
19 agree to stay prosecution of this action for this purpose and the  
20 Court ordered such a stay. Defendants have not argued or shown  
21 that their disobedience was outside their control. Thus, the  
22 Court concludes that their conduct demonstrates willfulness, bad  
23 faith, or fault.

24 The first two factors favor striking Defendants' answer.  
25 Their conduct has impeded resolution of this case and has  
26 prevented the Court from setting a schedule by which this case  
27 could proceed. The third factor also favors granting the motion.  
28 Defendants' refusal to participate in this action has prejudiced

1 Plaintiffs' ability to proceed to a trial to resolve the merits of  
2 their claims. See In re PPA Prods. Liab. Litig., 460 F.3d at  
3 1227. While courts generally hold that the fourth factor counsels  
4 against dismissal, "a case that is stalled or unreasonably delayed  
5 by a party's failure to comply with deadlines and discovery  
6 obligations cannot move forward toward resolution on the merits."  
7 Id. at 1228.

8 Finally, the Court concludes that the fifth factor also  
9 favors striking Defendants' answers. Defendants' conduct thus far  
10 demonstrates that a warning or additional chance to respond will  
11 not be effective. The Court made clear at the case management  
12 conference that it would entertain a motion for default judgment  
13 in this case. Defendants were also on notice that Plaintiffs  
14 sought to strike their answers. Yet, they failed to respond to  
15 the motion in any way. Further, as previously noted, they have  
16 not offered any explanation or reason to conclude that these were  
17 failures were not willful or in bad faith.


18 CONCLUSION

19 For the reasons set forth above, the Court GRANTS Plaintiffs'  
20 unopposed motion to strike Defendants' answers (Docket No. 18).  
21 Defendants' answers are hereby STRICKEN. The Court directs the  
22 Clerk to enter default against Defendants.

23 Plaintiffs shall file a motion for default judgment within  
24 thirty days of the date of this Order.

25 IT IS SO ORDERED.

26  
27 Dated: 7/23/2012

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CLAUDIA WILKEN  
United States District Judge